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6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**
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9 ENEDINO DURAN GOMEZ, et al.,
10 Plaintiffs,
11 v.
12 ROSSI CONCRETE INC., et al.,
13 Defendants.

Case No. 08cv1442 BTM (CAB)

**ORDER RE APPLICATION TO
TAKE MOTION FOR SUMMARY
JUDGMENT OFF CALENDAR**

14 Defendants seek to take Plaintiffs' motion for summary judgment as to liability on class
15 issues [dock. # 92], which is scheduled to be heard on March 10, 2011, off calendar. Also
16 scheduled to be heard on that date is Plaintiffs' motion to modify the class certification order.
17 [Dock. #89] Pursuant to the magistrate judge's case management order, motions regarding
18 class certification could be filed until February 14, 2011. Defendants filed a motion to
19 decertify the class on that date.

20 Defendants assert that postponing a determination of Plaintiffs' motion for summary
21 judgment until after class members have been given notice and an opportunity to opt-out is
22 necessary to avoid the problem of "one-way intervention" – whereby a potential class
23 member could await the outcome of a determination on the merits before deciding whether
24 to join the class. The Court agrees. "[D]istrict courts generally do not grant summary
25 judgment on the merits of a class action until the class has been properly certified and
26 notified." *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995). Absent extraordinary
27 circumstances, it is appropriate to postpone ruling on a plaintiff's motion for summary
28 judgment until after class definition issues are settled, notice has been given, and the period
for class members to exclude themselves has expired, in order to protect the defendant from

1 “absent class members . . . opting in or out depending upon the outcome on the merits.”
 2 *Izaguirre v. Tankersley*, 516 F. Supp. 755, 757 (D. Or. 1981).

3 In their response, Plaintiffs assert that because they seek only partial summary
 4 judgment and not a final judgment on the merits, which could have a *res judicata* effect on
 5 class members, the problem of “one-way intervention” is not implicated. (Opp. at 6)
 6 However, the Court does not find Plaintiffs’ proposed limitation to be appropriate when – as
 7 is the case here – a motion for partial summary judgment would reach the merits of the case.
 8 *C.f. Schwarzschild*, 69 F.3d 293, 295 (“The purpose of Rule 23(c)(2) is to ensure that the
 9 plaintiff class receives notice of the action well before the merits of the case are
 10 adjudicated.”) Although Plaintiffs are correct that in the abstract, “[c]lass members may
 11 always judge whether to opt-out or not based on how well the litigation is going so far,” (opp.
 12 at 6), here, allowing absent plaintiffs to make that determination after the Court adjudicates
 13 issues of liability in the underlying case would unfairly prejudice Defendants.

14 Additionally, relying on *Postow v. OBA Fed. Sav. & Loan Ass’n*, 627 F.2d 1370,
 15 1383-1384 (D.C. Cir. 1980), Plaintiffs argue that on equitable grounds, the Court should not
 16 wait until notice is given before ruling on the summary judgment motion. (Opp. at 3-4) In
 17 *Postow*, the District of Columbia Circuit held that there were “equitable reasons” for allowing
 18 final class designation and sending of notice to occur after plaintiffs’ motion for summary
 19 judgment was granted. *Postow*, 627 F.2d at 1383-1384.

20 Notwithstanding a lack of case law explaining what “equitable reasons” might direct
 21 such a conclusion,¹ the Court finds that such equitable considerations are not present here.
 22 At a status hearing days after the Court granted in part and denied in part Plaintiffs’ motion
 23 for class certification, Plaintiffs expressed a desire to seek modification of the class after

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 25 ¹ The *Postow* Court emphasized that it did “not intend to establish an inviolable rule
 26 for future cases” and that it was basing its holding on the narrow facts of that case. *Postow*,
 27 627 F.2d at 1383. Moreover, it is unsettled in the Ninth Circuit whether – and if so, in what
 28 circumstances – equity can support post-judgment certification and notice after determination
 of plaintiffs’ summary judgment motion. See *Schwarzschild*, 69 F.3d at 297 n.4 (“The District
 of Columbia Circuit, however, concluded that ‘equitable reasons’ may allow post-judgment
 certification and notice in cases in which the plaintiffs have succeeded on summary judgment
 in certain circumstances. *Postow*, 627 F.2d at 1383. We need not address the merits of that
 holding here and reserve judgment on that question.”).

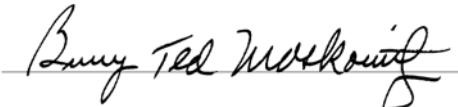
1 taking further discovery. (Oct. 5 Status Conf. Tr. 3:10–14) On January 13, 2011, they so
2 moved. [Dock. #89] Thus, this is not a situation where Defendants are solely responsible
3 for a delay in settling class definition issues. Moreover, unlike in *Postow* where the
4 defendant sought to vacate a class certification that was entered after plaintiffs were granted
5 summary judgment, here, Defendants seek only a prophylactic measure to ensure that a
6 summary judgment motion is not decided until after class members are given notice and an
7 opportunity to opt-out. Finally, Plaintiffs argue that postponing determination of their
8 summary judgment motion would result in prejudice due to a delay in having experts analyze
9 payroll records. (Opp. at 7) Although the Court recognizes the possibility that the case
10 management schedule may need to be altered depending on when the motion for summary
11 judgment is decided, the Court questions the impact of delaying expert analysis of payroll
12 records on a potential trial date given that no other aspect of this case hinges on the
13 determination of Plaintiffs' summary judgment motion. Regardless, any prejudice to Plaintiffs
14 caused by this delay would not outweigh prejudice to Defendants if there was an early
15 determination of the summary judgment motion prior to the conclusion of the opt-out period.

16 For these reasons, the Court **GRANTS** Defendants application and **DENIES** Plaintiffs'
17 motion for summary judgment as to liability on class issues [dock. # 92] without prejudice.
18 Plaintiffs may re-file their motion as soon as the two pending motions regarding class
19 certification are decided, notice has been given, and the period for class members to exclude
20 themselves has expired.

21 In the alternative, Plaintiffs ask the Court to order the notice procedure to begin
22 immediately – before motions related to the class certification are decided. As stated at the
23 status hearing, however, sending notice before class issues are settled may result in multiple
24 notices and thus create confusion for potential class members. Accordingly, this request is
25 **DENIED.**

26 **IT IS SO ORDERED.**

27 DATED: February 16, 2011

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Honorable Barry Ted Moskowitz
United States District Judge